

National Advisory Committee  
to the U.S. Representative to the  
Commission for Environmental Cooperation

May 15, 2000

The Honorable Carol M. Browner  
Administrator, U.S. Environmental Protection Agency  
401 M Street S.W.  
Washington, D.C. 20460

Dear Administrator Browner:

The National Advisory Committee to the U.S. Representative to the CEC held its fourteenth meeting on April 27 and 28, 2000, in Washington, D.C. We would like to thank the many government officials who spoke to us about CEC matters within their purview – Melida Tajbakhsh of the Fish and Wildlife Service, Otto Van Maerssen of USTR, Russell Smith of the Department of Justice, and Laura Lochman of the State Department, as well as Bill Nitze, Alan Hecht, John Audley, Lorry Frigerio, Anne Rowley, David Strother, John Harman, Catherine Malinin-Dunn, and Beverly Updike of EPA. We particularly appreciate their thoughtful and candid responses to our questions. As we have noted in the past, this type of dialogue with the government agencies engaged in the wide range of CEC matters is particularly helpful to us, since our advice is directed to the U.S. government as a whole, rather than to any one agency.

We spent much of our time discussing issues concerning the Article 14-15 submissions procedure. Our discussions have resulted in Advice No. 2000-2, which is attached to this letter. In Advice No. 2000-2, we make three general recommendations, in the strongest possible terms: (1) that the Council seek public comment on the issues raised before any further substantive discussions among the Parties take place; (2) that the U.S. government keep us informed of and seek our views on any developments in this area; and (3) that the U.S. government and the other Parties not attempt to reach joint interpretations of issues concerning preparation of factual records (either on an ad hoc basis or through a working group), since any such attempt would necessarily infringe on the discretion the Agreement provides the Secretariat. A representative of the Governmental Advisory Committee participated in drafting this letter, and my understanding is that the letter represents the views of the GAC as well.

Our other discussions resulted in Advice No. 2000-3, in which we recommend that the U.S. government consider ways to increase funding of CEC activities, and Advice No. 2000-4, in which we recommend several ways to improve our Committee's effectiveness. In addition to the advice letters, we would like to note our concern that CEC documents, in particular its annual program, are often written in a way that makes them difficult to comprehend. We plan to follow this issue of readability more closely in the future. We would also like to inform you that we are appointing a working group to examine trade-and-environment issues, with a view toward preparing more extensive advice on those issues in the future as well.

We also discussed the June Council session. While we were disappointed that the U.S. government was unable to decide on a venue for the Council session well in advance or to schedule a conference around it, as we had recommended, we are looking forward to an interesting and productive session. In particular, we are looking forward to discussing emerging trends with the JPAC and learning more about children's health initiatives. We also welcome the invitation from EPA officials to participate as observers in the meetings between the JPAC and the Council. Finally, while we know that you have many demands on your time at the session, we recall with great appreciation your finding the time to meet with members of the NAC and GAC in Banff last year. We therefore request that EPA consider arranging a similar meeting at some point at this year's meeting.

Very truly yours,

John H. Knox  
Chair, National Advisory Committee

#### Attachments

cc: Bill Nitze, Assistant Administrator for International Activities  
John Audley, Environment and Trade Coordinator  
Clarence Hardy, Director, Office of Cooperative Environmental Management  
Robert Varney, Chair, U.S. Governmental Advisory Committee  
Regina Barba, Chair, Joint Public Advisory Committee  
Bill Andrews, Chair, Canadian National Advisory Committee  
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee  
U.S. NAC Members

National Advisory Committee  
to the U.S. Representative to the  
Commission for Environmental Cooperation

**NAC Advice No. 2000-2**

**The Article 14-15 Submissions Procedure**

By letter dated April 3, 2000, and again at our meeting on April 27, EPA requested us to provide advice on a March 27, 2000 paper containing U.S. government positions on eleven issues relating to the Article 14-15 submissions procedure. In the course of our discussion of those issues, it became clear that they raise two larger questions: (1) whether discussions among the Parties on these issues should involve the public; and (2) whether it is appropriate for the Parties to try to reach interpretations of the Agreement on these issues.

We have examined these larger questions in light of our previous positions concerning the submissions procedure. In November 1998, the NAC reviewed proposed revisions to the guidelines on submissions and concluded that

the current guidelines appear to be working well and that revisions to those guidelines are not warranted in light of the experience to date. The NAC is deeply concerned that many of the proposed revisions would unduly restrict the discretion of the Secretariat in a manner inconsistent with the intent and terms of the Agreement, and thus inhibit the vindication of the right of North American citizens to bring concerns about enforcement deficiencies by national and subnational governments to the CEC for serious and impartial scrutiny. Even the less detrimental proposals put forward promote a process of micro-management by the Parties of the Secretariat in the exercise of functions committed by the Agreement to the Secretariat. We oppose the adoption by the Council of the proposed revised guidelines as currently drafted.

We also provided this advice to the JPAC in January 1999, at the workshop it held to consider public comments on the proposed revisions.

In March 1999, we and the GAC provided answers to several questions concerning the preparation of a factual record. We emphasized that continued negotiation of guidelines by the Parties concerning preparation of factual records

would be likely to constrain the discretion of the Secretariat in unacceptable ways. The process of gathering information to prepare a factual record is a Secretariat function and the Council should intervene in that process only if the Secretariat is acting contrary to the NAAEC. Micromanagement of the process by the Council would remove the discretion the Agreement provides the Secretariat and make preparation of factual records a process essentially run by the Parties. That would

drastically undermine the usefulness and credibility of the entire Article 14-15 procedure.

Most recently, in September 1999, we commented on the Council's decision to adopt revisions to the guidelines at the Banff meeting. We concluded that

it is extremely troubling that these changes were not among those included in the proposed amendments circulated for public comment. The Council's decision to approve such changes without providing the public any opportunity to comment on them, especially in light of the strong public opposition to the other changes considered, will necessarily raise doubts about the Council's commitment to listening to the public before revising the guidelines, and to the submissions procedure itself -- a procedure that this Committee has previously described many times as integral to the success of the Agreement. For all of these reasons, the Committee will remain particularly vigilant regarding the future functioning of the Article 14-15 procedure, and will seek ongoing information from the Secretariat and other sources to evaluate the effect, if any, of the revisions.

These excerpts from our previous advice reveal three fundamental principles. First, a procedure that has resulted in only one factual record needs more time to operate before the Parties consider any significant changes to it. Second, the discretion provided the Secretariat by Articles 14 and 15 is integral to the procedure and any new interpretations or amendments by the Parties must not restrict that discretion, at the risk of undermining the procedure itself. Third, any consideration of amendments to or interpretations of the submissions procedure must be undertaken in a transparent manner with opportunity for meaningful public input.

Based upon these principles, we make the following recommendations concerning the two overarching issues identified above.

**First, the public must be provided the opportunity to provide meaningful input into any discussions among the Parties concerning the Article 14-15 process.** Specifically, the Council should, with the help of the JPAC, obtain public comment on the issues raised by the Parties, and in particular on the propriety of the Council's considering them at all, before any further substantive discussions among the Parties take place. In addition, the U.S. government should continue to keep the U.S. public informed and seek its advice regarding any significant developments in this area as they occur.

**Second, the U.S. government and the other Parties should not attempt to reach joint interpretations of issues concerning preparation of factual records (either on an ad hoc basis or through a working group), since any such attempt would necessarily infringe on the discretion the Agreement provides the Secretariat.** While we recognize that the U.S. government cannot and should not refuse to talk to the other Parties about their concerns, we strongly believe that the U.S. government should make clear that it will not agree to any effort to prepare guidelines (however called) for the Secretariat on preparation of factual records or otherwise to amend or renegotiate the submissions procedure.

The following sections elaborate on these recommendations.

**1. The Need for Public Participation.** The first overarching question is whether any discussions among the Parties on these issues should involve the public. The answer is obvious: of course it should. The Article 14-15 procedure provides the public an extremely important way to contribute to the implementation of the NAAEC. Any new interpretations of that procedure by the Parties therefore must provide an even higher degree of openness to meaningful public input than is usually required with respect to CEC programs.

The CEC sought public comment on the original guidelines and the revisions to the guidelines long before the Council considered their adoption. In contrast, with respect to the current issues under consideration, the Council has not circulated the Parties' draft positions for comment by the JPAC or the public at large. Indeed, the Council has not even announced that it continues to consider issues concerning the submissions procedure. Understandably, many observers appear to have concluded that the adoption of revised Guidelines by the Council at Banff ended the lengthy, often controversial amendment procedure – or at least suspended it indefinitely.

We therefore recommend in the strongest terms that the Parties obtain public comment on these issues, and in particular on the propriety of the Council's considering them at all, before any further substantive discussions among the Parties take place. The JPAC is the appropriate body to seek such public comment, as it has in the past.

While we appreciate the U.S. government's recent decision to seek our advice and to notify the public as to its position, we note that it could and should have done so far earlier in the process. We request that the U.S. government keep the U.S. public and, in particular, the NAC, informed on an ongoing basis of any developments in this area and seek our views as early as possible in its preparation of any new substantive or procedural positions.

**2. The Respective Roles of the Secretariat and the Parties.** The second overarching question is whether it is appropriate for the Parties to try to reach interpretations of the Agreement on the issues raised by the U.S. government position paper.

Of the eleven issues addressed by the position paper, ten concern preparation of factual records. We therefore focus on the implications of the Parties' discussions on the preparation of factual records, although we recognize that some of the issues address other areas as well.<sup>1</sup> We also note that the number of issues under consideration by the Parties has apparently increased greatly in the last year, from three to eleven, and that reports from several quarters indicate that the Parties are considering whether to establish a working group of some kind to consider such interpretative issues on an ongoing basis.

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<sup>1</sup> Issues 3, 4, 7, and 8 are not limited to the preparation of factual records, since the questions they address may also concern earlier stages in the submissions procedure. The only issue that does not directly concern preparation of factual records at all is Issue 9, regarding the meaning of Article 14(2)(c).

We strongly believe that attempts by the Parties to reach interpretations of issues concerning preparation of factual records are highly inappropriate, for two reasons.

First, six years after the entry into force of the NAAEC, the CEC has still produced only one factual record and has approved the preparation of only one other, the release of which is still pending. It seems obvious that any attempt to devise general rules to govern the preparation of factual records should await the accumulation of additional experience with the procedure. The procedure is still far too young for any CEC body – the Council, the Secretariat, or the JPAC – to consider interpretive rules that would restrict the procedure’s ability to respond to unforeseen cases.

Second, and more fundamentally, it is inappropriate for the Parties to attempt to provide binding interpretations concerning preparation of factual records. As we have stated more than once before, preparation of factual records is a Secretariat function. Micromanagement of that function by the Parties is contrary to the letter and the spirit of the Agreement.

The Agreement clearly provides the Secretariat and the Council alternating roles in the submissions procedure. The Secretariat is responsible for administering the threshold requirements in Article 14(1) and weighing the factors in Article 14(2) in deciding whether to request a Party response; under Article 14(3), the individual Party concerned is responsible for responding; under Article 15(1), the Secretariat is responsible for deciding whether to recommend the development of a factual record; under Article 15(2), the Council is responsible for deciding whether to instruct the Secretariat to do so; the Secretariat is responsible for preparing the factual record and submitting a draft factual record to the Council under Articles 15(4) and 15(5); under Article 15(5), the Parties are responsible for providing comments on the draft; the Secretariat is responsible for incorporating such comments as it deems appropriate under Article 15(6); and the Council is responsible for deciding whether to make the final factual record publicly available under Article 15(7).

The complex procedure detailed in the Agreement delineates the respective responsibilities of the Secretariat and the Council. The Agreement’s text and structure make clear that it is for the Secretariat, and not for the Council, to decide how best to prepare a factual record within the requirements of the Agreement. Hence, we are deeply troubled that many of the issues addressed in the U.S. position paper appear to assume that the Council has the role of overseeing every aspect of the Secretariat’s preparation of a factual record. For example, the issues concern the extent to which the Secretariat may consider harm to the environment (Issue 1) and gather information concerning Parties’ explanations of why its enforcement is not ineffective (Issue 6), whether certain types of factual records may be prepared at all (Issues 10 and 11), and even the definition of the term “factual record” (Issue 5). Most troubling is Issue 4, which suggests that the Council will consider whether any Party may stop the Secretariat from preparing a factual record (or considering a submission at all) simply by raising an issue of interpretation.

Our concerns in this regard are greatly heightened by reports that the Parties are considering the creation of a working group to consider questions of interpretation on an ongoing basis. We strongly believe that the Council would overstep its proper bounds and act in violation

of the Agreement through detailed oversight of the Secretariat's preparation of factual records. At the risk of repeating the obvious, Article 15 specifically states that it is the Secretariat that "shall prepare a factual record" if the Council instructs it to do so, and Article 15 specifically provides the Secretariat authority to consider *any* relevant information submitted by the public or the JPAC or developed by the Secretariat or independent experts. Article 21(1) *requires* each Party to provide such information as the Secretariat "may require, including: (a) promptly making available any information in its possession required for the preparation of a . . . factual record, . . . and (b) taking all reasonable steps to make available any other such information requested." It is impossible to read into these provisions a role for the Council in overseeing preparation of factual records. More fundamentally, such a role would be inconsistent with the object and purpose of the submissions procedure. The procedure is designed to produce impartial reports on highly sensitive topics – whether a Party has failed to effectively enforce its own law. By their nature, the Parties will always be interested parties with respect to the submissions procedure, since it is their enforcement practices that the procedure scrutinizes. They therefore cannot oversee the Secretariat's preparation of factual records without undermining the procedure's credibility and effectiveness.

We understand that the prospect that the Secretariat prepares factual records without detailed Council oversight may cause the Council some discomfort. We believe that to the extent that the discomfort results from the fear that the Secretariat may prepare embarrassing reports, the discomfort is exactly what the Agreement contemplates would result from the Article 14-15 procedure, and that it cannot legitimately provide a basis for the Council to impose checks on the Secretariat's discretion.

The Council may instead believe that it must provide some oversight over the Secretariat in order to avoid the possibility that the Secretariat may abuse its discretion or even act contrary to the Agreement. Such a belief would not justify overseeing the preparation of factual records (or any other element of the procedure committed to Secretariat discretion) for two reasons.

First, there is no reason to believe that the Secretariat will act inappropriately, much less contrary to the letter or spirit of the Agreement. We have not been made aware of a single instance of unprofessional conduct by the Secretariat. On the contrary, the most comprehensive studies of the Secretariat's administration of the submissions procedure have concluded that the Secretariat has acted appropriately and in accordance with the terms of the Agreement. For example, a survey of participants in and observers of the CEC has stated:

In general, respondents concluded that the response of the Secretariat to each of the submissions was appropriate. This did not mean that respondents were pleased with the Secretariat's response in all cases. Some respondents felt that while results were undesirable from the perspective of environmental protection, the Secretariat was constrained by the terms of the Agreement to process the submissions as it did.<sup>2</sup>

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<sup>2</sup> Joseph DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 Geo. Int'l Env. L. Rev. 651, 695-96

Similarly, the report of the Independent Review Committee established to review the CEC after its first four years of operation concluded that “the decision-making by the Secretariat [in the submissions procedure] has been professional and appropriate.”<sup>3</sup>

Second, any fears of Secretariat abuse of discretion may be addressed through methods less draconian than ongoing Party oversight of factual record preparation. In particular, the Agreement provides recourse for the Council should the Secretariat abuse its role. For example, Article 21(2) provides a way for a Party that “considers that a request for information from the Secretariat is excessive or otherwise unduly burdensome” to seek a decision from the Council limiting the scope of the request. (This provision would provide a way for a Party faced with the question considered in Issue 2 to seek relief.) Moreover, if the Council believes that the Secretariat has overstepped its bounds in its treatment of a submission, it has the discretion under Article 15(2) not to approve the Secretariat’s request to prepare a factual record. If a Party believes that the Secretariat’s preparation of a factual record has been improper in some respect, it has the ability to provide comments on the draft factual record before it is submitted to the Council. Finally, under Article 15(7), the Council has the ability to decide not to publish a factual record, or to publish it with whatever accompanying remarks that it sees fit to make. The Council’s judicious exercise of these powers, combined with public communication of the reasons for its decisions, would go further in addressing any legitimate concerns regarding abuse of discretion by the Secretariat than would the process under consideration by the Parties. It would also avoid the proclivity of the Parties to micromanage, through continuous negotiations, the Secretariat’s inherently discretionary functions in a manner that fundamentally delays and impairs the procedure.

Of course, the Council’s powers may be subject to conflicting interpretations as well, or even abuse of the discretion the Agreement provides the Council. We recognize that some of the issues in the U.S. position paper, such as Issues 10 and 11, may primarily concern the Council’s decision as to whether to approve preparation of a factual record, rather than the nature of the preparation of the factual record itself. To that extent, we are concerned about those issues less with respect to undermining Secretariat discretion than with respect to the Council’s current inability to approve requests for factual records. We note that three requests for factual records have been pending before the Council for some time.

We strongly support the U.S. government’s desire that Council approval of requests for factual records under Article 15(2) not become a bottleneck, or worse. But increasing the Council’s control over the Secretariat’s discretion in preparing factual records would “solve” the problem only by undermining the procedure as a whole. We therefore strongly believe that

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(1998). The survey was of “members of the Council, the Secretariat, the JPAC, advisory groups in each of the participating countries, observers in each of the countries, business people, environmental activists, academics and others (including people who support Commission efforts and performance as well as those who remain skeptical).” *Id.* at 690.

<sup>3</sup> Four-Year Review of the North American Agreement on Environmental Cooperation: Report of the Independent Review Committee 20 (1998).



solutions must be sought elsewhere. In particular, we believe that the answer may lie in increasing the commitment among all three Parties to address any problems revealed by factual records in a spirit of cooperation rather than confrontation.

We find the difference between Article 13 reports and Article 15 factual records instructive. Article 13 reports concern topics that are no less sensitive than those addressed by Article 15 factual records. They have proved far less controversial, however. We believe one key difference has been that Article 13 reports have been undertaken with a view toward identifying not only problems but also ways that the Parties can cooperatively address them, as the Silva Reservoir and San Pedro River reports illustrate. Article 15, by contrast, has sometimes been seen as providing a potential basis for complaints under Part Five, which could lead to confrontation and even sanctions rather than cooperative solutions. But nothing in Article 15 or the Agreement as a whole establishes a fixed connection between Article 15 factual records and Part Five dispute resolution. We believe that factual records would be more useful, and far more palatable to the Parties, if the Parties discussed and institutionalized ways in which they would lead to increased cooperation, rather than the potential (even if remote) for greater confrontation. We note that the Parties already have established extensive institutional cooperation in enforcement matters under CEC auspices, on which such discussions could build. We strongly encourage the U.S. government to pursue such discussions with the other Parties.

We are aware that this advice is not directed to the specific questions asked of us. But we believe that these broader questions required our immediate attention. We continue to examine the specific U.S. positions presented to us and are discussing whether to provide more specific comments on them. Any such comments will, of course, be subject to the fundamental concerns and recommendations we have expressed above.

**National Advisory Committee  
to the U.S. Representative to the  
Commission for Environmental Cooperation**

**NAC Advice No. 2000-3**

**Additional Funding for CEC Activities**

We believe that the U.S. government should consider ways to increase funding of CEC activities. In recent years, the mandates placed on the CEC have grown enormously while its budget has remained fixed. Given the importance of CEC activities and the widespread support for them, the Council should not cut back on these mandates. Instead, the financial support for CEC programs should increase.

We see three ways in which that increase could occur. Most obviously, the Council should consider increasing the basic budget for the CEC, which has not changed since its inception. We recognize that while the Parties pay equal shares of the budget, the relative burden of paying these dues is heavier on Canada and (in particular) Mexico than it is on the United States. If an across-the-board increase in dues is therefore politically unpalatable, we recommend that the United States find additional ways to provide funds to CEC programs on a non-reciprocal basis. We note that the U.S. government has provided such non-reciprocal, voluntary contributions to many other international organizations in the past. To avoid the appearance of undue influence on the creation of new CEC programs, the U.S. government might provide such funds to existing programs that already enjoy Council support and provide benefits throughout North America. It might be appropriate to consider such contributions to the NAFEC, for example, assuming that the ongoing analyses of the NAFEC indicate that an increase in its funding is desirable.

Finally, we believe that apart from increases in funds provided directly to CEC programs, the U.S. government should carefully consider increasing its domestic funding for programs related to CEC activities. We note that one of the CEC's primary functions is to serve as a catalyst for activities implemented by the three governments. Adequate funding at the domestic level is therefore critical for the success of CEC initiatives. For example, we are concerned that the Sound Management of Chemicals (SMOC) program apparently faces constraints in its ability to consider new chemicals, and that such constraints result not (or not only) from limits on CEC resources, but from limits on the resources devoted to implementation of the program by the governments. We therefore urge the U.S. government to consider whether it is providing adequate resources to implement CEC initiatives at the domestic level, and to increase such funding wherever appropriate.

National Advisory Committee  
to the U.S. Representative to the  
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**NAC Advice No. 2000-4**

**Future Work of the National Advisory Committee**

In the interest of improving the usefulness of our deliberations and advice to the U.S. government, we make the following recommendations regarding our future work:

**1. Membership.** We appreciate the effort made by EPA to name new members to the committee and trust that the vacant positions will be filled in the very near future. But we must emphasize the importance of filling positions more promptly in the future. Four current members' terms have already expired. The remaining four members' terms expire in September 2000. We reiterate that the NAC cannot adequately fulfill its responsibilities unless those positions are filled in a timely manner – i.e., no later than September 2000.

**2. Retreat.** After the next round of new members is appointed, we believe that the NAC members should go on a retreat to discuss long-term priorities. The last retreat of this kind was two years ago, shortly before several members left the committee. We believe the next retreat would be more useful if it took place early in the terms of as many members as possible.

**3. Response to Advice Letter.** We appreciate the April 26 letter from Assistant Administrator Nitze, which responded in detail to our advice letter of February 17. This kind of response is necessary to our being able to follow up on our advice and provide useful advice in the future. But we request that future responses be provided farther in advance of our meeting, so that we have time to consider the response before our discussions resume.

**4. CEC Secretariat Participation in Meetings.** We very much appreciate the effort the Executive Director and other officials of the CEC Secretariat make to attend our meetings. Their ability to provide information about CEC programs is vital to our work, so much so that at meetings like the most recent one, at which their participation is relatively limited, we find that we are unable to usefully discuss certain areas. We therefore ask EPA to pass on our request to the Secretariat that they attend our meetings even more regularly. At the same time, with EPA's help, we will try to inform the Secretariat in advance as to which issues are likely to be discussed at which point in our meeting, so that the Secretariat's participation may be most efficient.

**5. NAC Specialists.** We have found it difficult to stay informed about the wide range of CEC issues between meetings. Individual members have therefore volunteered to monitor developments in specific areas, in order to take the lead in committee consideration of possible advice in those areas. We will provide you separately with a list of the individuals and their corresponding specialties. We request that EPA and other agencies relevant to these areas keep our "specialists" in the loop, to the extent possible, on these issues. As a starting point, we request that you provide each of our specialists with the names, email addresses, and telephone

numbers of the government official(s) responsible for the areas within the specialist's purview and, conversely, provide each specialist's name, email address, and telephone number to the appropriate government official(s). We hope that this will facilitate communication between meetings among the NAC members and the government officials on CEC issues.